

September 15, 2014

Tom Wheeler, Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Wheeler:

We urge you not to base new net neutrality regulations on Title II. Attempting to retrofit the onerous set of regulations developed for the monopoly telephony network onto the Internet would be a disaster for Internet users everywhere. That's why it has been rejected by four FCC Chairmen (of both parties), leading Democratic Senators as early as 1998, 74 House Democrats as late as 2010,¹ *all* Congressional Republicans, and the entire broadband industry.

Government *should* be able to police any deals between broadband companies and content providers to make sure they don't harm consumers or competition. But the FCC doesn't need Title II to do that. The FCC has already claimed vast authority under Section 706, including the power to issue new net neutrality rules.

Title II won't actually do what those pushing it claim: **Title II would *not* ban "paid prioritization."**² It's not even yet clear what that vague term means, but it would certainly include some deals that would actually *help* users.

If anything, Title II would probably make paid prioritization *more* likely:³ Title II's costs and price controls could force broadband providers to turn to paid prioritization as a new revenue source. Globally, **imposing Title II would validate efforts by European carriers to impose sender-pays rules**, the default assumption of the Title II-style regimes in Europe. That means American web companies would have to pay European carriers to deliver traffic to European users — the very opposite of net neutrality.

Title II would undermine 15 years of American insistence around the world that the Internet shouldn't be regulated under traditional telecom rules. That would only play into the hands of the bizarre alliance of European carriers and repressive governments who have fought hard to transfer Internet governance from the bottom-up, multistakeholder model of ICANN to the United Nations' International Telecommunication Union and its "International Telecommunication Regulations."⁴ That, in turn, would make censorship and surveillance easier around the world, while slowing broadband deployment to the world's poor and underserved.

¹ See Berin Szoka, *Democrats Tell FCC Not to Regulate Broadband as a Utility — Back in 1998*, TECHFREEDOM (June 20, 2014), <http://bit.ly/1nQIzM3>.

² Under Section 202, the FCC can only require that differences in rates for prioritization are "just and reasonable." Thus, Title II would actually enshrine prioritization into law.

³ See, e.g., George S. Ford & Lawrence J. Spiwak, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service*, PHOENIX CENTER POL'Y BULL. NO. 36 (Sept. 2014), available at <http://www.phoenix-center.org/PolicyBulletin/PCPB36Final.pdf> (arguing that the FCC may be legally required to set prices for carrying traffic).

⁴ Larry Downes, *Why is the UN Trying to Take over the Internet?*, FORBES (Aug. 9, 2012), <http://www.forbes.com/sites/larrydownes/2012/08/09/why-the-un-is-trying-to-take-over-the-internet/>.

Validating the imposition of Title II-style telecom rules would jeopardize the “zero-rating” plans that Facebook, Google, Twitter, Wikipedia and others have launched to get the world’s poor online — just as overzealous interpretation of the FCC’s 2010 Open Internet Order forced MetroPCS to abandon plans to offer free YouTube as part of a mobile service plan geared towards low-income consumers in American inner cities.⁵

In the U.S., innovative **web companies would not be safe from Title II**. Contrary to *recent* assertions, there is no such thing as “reclassification.” The FCC can only *re-open* the complex mess of definitions left murky by Congress in the 1996 Act. Re-interpreting these to make broadband a Title II service would likely sweep in other services, too. If this FCC can identify a “transmission” component in broadband, what will stop a future FCC from reaching the same conclusion about VoIP, video services, content delivery networks, hosting, or many other services at the core of the Internet?⁶

VoIP pioneer Jeff Pulver, founder of Vonage, knows better. Having fought hard to get the FCC to keep VoIP out of Title II, he recently warned that the **“madness of applying Title II means declaring everything telecom.** It requires an entirely new standard and ends 60 years of precedent underlying the telecom versus information services distinction. ... I have no idea how to judge the difference between IP transmission and IP services for the purposes of my next startup. I will not be able to explain it to investors, because the **line exists entirely in the mind of whoever happens to be Chairman of the FCC.** Applying Title II to IP networks creates a new Federal Computer Commission with authority to weigh in on everything connected to an IP network, in other words — everything.”⁷ This very slippery slope may explain why Google and Facebook have been silent on the push for Title II.

Title II includes a slew of burdensome regulations, from price controls to tariffs and listings of prices, which economists have long known facilitate collusion among regulated companies and make markets *less* competitive. Title II is appropriate only for true, “natural” monopolies, where competition is impossible. Otherwise, it is a self-fulfilling prophecy, tending to discourage new competition.

Every previous FCC Chairman, regardless of party affiliation, has attempted to protect Internet services from common carriage regulation. Bill Kennard, President Clinton’s second FCC Chairman, was perhaps most instrumental in drawing a **clear, bright line between the Internet and Title II**. Kennard knew that imposing the “morass” of traditional telephone regulations on broadband would discourage cable companies and telcos from building out competing infrastructure. His **“vigilant restraint” under Title I unleashed over a trillion dollars in investment in the U.S. That meant much greater deployment and faster speeds than European countries that stuck to a Title II model.**⁸ That approach has benefitted underserved Americans most, which is why the NAACP,⁹ Minority Media and

⁵ See Protecting & Promoting the Open Internet, *ICLE & TechFreedom Policy Comments*, GN Docket No. 14-28, 24-32 (July 17, 2014), available at <http://bit.ly/1m0go1J>; see also Matthew Lasar, *MetroPCS: The Open Internet on a Budget?*, ARSTECHNICA (Feb. 16, 2011), <http://bit.ly/1xTSGcB>.

⁶ See Protecting & Promoting the Open Internet, *TechFreedom & ICLE Legal Comments*, GN Docket No. 14-28, 24-32 (July 17, 2014), available at <http://bit.ly/1pcZHLu>.

⁷ Jeff Pulver, *Fear & Loathing as Telecom Policy*, HUFFINGTON POST (Aug. 6, 2014), http://www.huffingtonpost.com/jeff-pulver/fear-and-loathing-as-tele_b_5654881.html.

⁸ See Christopher S. Yoo, *U.S. vs. European Broadband Deployment: What do the Data Say?*, 13-21 (June 2014), available at <https://www.law.upenn.edu/live/files/3352-us-vs-european-broadband-deployment>.

⁹ See Protecting & Promoting the Open Internet, *Comments of the Communications Workers of America & the National Association for the Advancement of Colored People*, GN Docket No. 14-28, 24-32 (July 15, 2014), available at <http://bit.ly/1r54LEz>.

Telecommunications Council and 42 other minority organizations have opposed Title II.¹⁰

Kennard's policies have continued for sixteen years and drawn broad bipartisan support. Re-opening Title II would shatter this consensus. Proponents acknowledge the problems with Title II, but say the FCC can waive them away through "forbearance." **Forbearance is an illusion.** An increasingly activist FCC has made forbearance almost impossible to justify. Legally, it's not clear the FCC can lower that bar¹¹ or forbear at all if broadband providers have the "terminating monopoly" the FCC claims.¹² But even if the FCC could forbear, it's not likely to do so—lest a future Republican FCC use forbearance to gut the Telecom Act. And of course those talking about "Title II Lite" today would fight forbearance in practice. Even if possible, forbearance would become a political football and a tool for the FCC to pressure companies to do things the FCC could not legally require. The FCC has a long history of abusing such leverage. In short, **Title II is a Trojan Horse for far more than net neutrality.**

We urge you to maintain the bipartisan consensus against Title II.

The Communications Act clearly directs the FCC to recommend new legislation to Congress.¹³ You should use that power to propose legislation that once and for all resolves questions regarding the FCC's authority over broadband with clear, specific language focused on core net neutrality concerns.

We recommend that **such legislation should forever bar application of Title II to the Internet, narrowly focus Section 706, and remove barriers to deployment at all levels of government.** Government should make it as easy as possible for the private sector to build broadband networks, both to upgrade existing networks and to build new networks. Far from encouraging competition, Title II would choke it.

Mister Chairman, **please don't break the Net** by imposing Title II. Before acting on Title II, please consider the petition hosted at DontBreakThe.Net, which concludes, "Competition, not endless litigation and political bickering over Title II, should be your legacy."

Respectfully,

¹⁰ See Protecting & Promoting the Open Internet, *Comments of the National Minority Organizations*, GN Docket No. 14-28, 24-32 (July 15, 2014), available at <http://bit.ly/1nu7CIY>.

¹¹ See Protecting & Promoting the Open Internet, *TechFreedom & ICLE Legal Comments*, GN Docket No. 14-28, 32-48 (July 17, 2014), available at <http://bit.ly/1pcZHLu>.

¹² See Ford & Spiwak, *supra* note 3, at 16.

¹³ Communications Act of 1934, Pub. L. No. 73-416, § 4, 48 Stat. 1064, 1066 (1934) (codified at 47 U.S.C. 154(k)(4)).

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